Calendar No. 249

101ST CONGRESS *1st Session*	SENATE	REPORT 101-135

FEDERAL TRADE COMMISSION ACT AMENDMENTS OF 1989

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1249

SEPTEMBER 18, 1989.—Ordered to be printed

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SEPTEMBER 18, 1989.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1249]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1249) to amend the Federal Trade Commission Act to provide authorization of appropriations, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to amend the Federal Trade Commission Act (15 U.S.C. 41 et seq.) to change the investigative, adjudicative, and rulemaking authority of the Federal Trade Commission [FTC], and to extend authorization of appropriations for the agency. This legislation would authorize to be appropriated $69,580,000 for fiscal year 1990, $72,780,000 for fiscal year 1991, and $76,128,000 for fiscal year 1992.

BACKGROUND AND NEED

Under the FTC Act, the Commission seeks to prevent anticompetitive conduct through its authority over "unfair methods of competition," and protect consumers through its "unfair or deceptive acts or practices" authority. The Commission may enforce this mandate through case-by-case adjudications under section 5 of the FTC Act (15 U.S.C. 45) and through industry-wide rulemaking.

In the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 (Public Law 93-637), Congress added a new section 18 to the FTC Act (15 U.S.C. 57a), providing the FTC

explicit authority and detailed new procedures for promulgating trade rules to prohibit "unfair or deceptive" practices. Largely as a result of dissatisfaction with the Commission's exercise of its section 18 consumer protection rulemaking authority, Congress redirected some of the FTC's rulemaking and added additional rulemaking procedures in the FTC Improvements Act of 1980 (Public Law 96–252).

A number of provisions of the FTC Improvements Act expired at the end of fiscal year 1982, and the Commission has been without an authorization of appropriations since that time. During the 97th through 100th Congresses, the Committee monitored the Commission's compliance with the FTC Improvements Act and, in connection with the FTC's reauthorization, undertook a broader review of the Commission's exercise of its statutory mandate. This process resulted in the development of four authorization bills (S. 2499, S. 1714, S. 1078, and S. 677) that were reported by the Committee in the 97th, 98th, 99th, and 100th Congresses, respectively. S. 2499 and S. 1714 were not acted upon by the Senate prior to final adjournment. S. 1078 and S. 677 were acted upon by the Senate but failed in conference.

The Committee's review of the FTC's activities has continued in the development of S. 1249, the Federal Trade Commission Act Amendments of 1989. This measure extends the authorization for the FTC and makes changes in the FTC's authority and procedures based on bills adopted by the Committee and reported in the 97th through 100th Congresses.

In addition, in this Congress the Committee has been assisted in its review of the FTC by the report of the American Bar Association's Special Committee to Study the Role of the Federal Trade Commission, commonly referred to as the "Kirkpatrick Committee". This report updated a similar effort undertaken in 1969. The Kirkpatrick Committee was charged with studying the FTC and formulating recommendations as to the appropriate role of the FTC as a Federal governmental agency. The report addressed the antitrust, consumer protection, and consumer advocacy programs of the FTC, and considered the role of economic analysis in the FTC's decisionmaking, resources of the Commission, and its relationship with Congress and the States.

UNFAIRNESS STANDARD

In particular, evaluation and study of the FTC's authority to prohibit "unfair . . . acts of practices" has continued since 1980. Enacted as part of the Wheeler-Lea Amendment in 1938, the FTC's consumer "unfairness" authority was not a focus of enforcement action until 1964 when, as part of its Statement of Basis and Purpose for a proposed cigarette health warning rule, the FTC identified these factors to be considered in applying the prohibition against consumer unfairness: (1) whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous.[1] These three factors were

[1] Statement of Basis and Purpose, Unfair or Deceptive Advertising and Labeling of Cigarettes in relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8355 (1964).

later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchison*.[2]

In response to concerns that the FTC's unfairness authority was poorly defined by these principles and potentially unbounded, the Consumer Subcommittee requested public comment on the scope of the FTC's unfairness authority,[3] and wrote to the FTC to request more specific views.

In its December 17, 1980 letter in response, the FTC abandoned one portion of its 1964 unfairness criteria and, summarizing its past use of unfairness in decided cases and rules, articulated guiding principles for future application of its unfairness mandate. Under the Commission's policy statement, unjustified consumer injury is the primary focus of the FTC Act, and the most important of the 1964 criteria. Not every consumer injury is legally "unfair", however; to justify a finding of unfairness, the injury must satisfy three tests:

> It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.[4]

With regard to the second of the 1964 criteria, the FTC observed that while "established public policy" may sometimes support independent Commission action, it is used most frequently by the FTC as a means of providing additional evidence of consumer injury. Such a policy must be "clear and well-established" and:

> Declared or embodied in formal sources such as statutes, judicial decisions, or the Constitution as interpreted by the courts, rather than being ascertained from a general sense of rational values. The policy should likewise be one that is widely shared, and not the isolated decision of a single state or a single court.[5]

The FTC explicitly abandoned future use of the third part of the 1964 criteria relating to "unethical and unscrupulous" conduct.

On March 5, 1982, the FTC wrote again to the Committee,[6] reaffirming the principles of its December 17, 1980 policy statement and recommending that they be codified as a statutory definition of unfairness. Section 9 of S. 1249 contains such a definition of unfairness.

COMMERCIAL ADVERTISING

In addition to problems with the scope of the FTC's unfairness authority, the Committee has been concerned with the use of unfairness to regulate commercial advertising. Traditionally, both before and after the Wheeler-Lea Amendment of 1938, the FTC has

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[2] *FTC* v. *Sperry & Hutchinson, Co.*, 405 U.S. 223, 244-45 n. 5 (1972).

[3] The public comments received have been printed by the Committee. *See* Senate Committee on Commerce, Science, and Transportation, 96th Cong., 2d Sess., Unfairness: Views on Unfair Acts and Practices in violation of the Federal Trade Commission Act (Comm. Print 1980).

[4] December 17, 1980 letter from FTC to Senators Ford and Danforth at page 5. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97-108).

[5] December 17, 1980 letter from FTC to Senators Ford and Danforth, supra note 4, at page 12.

[6] March 5, 1982 letter from FTC to Senators Packwood and Kasten. This letter is printed in the record of the Committee's March 18, 1982 hearing (Serial No. 97-108).

regulated commercial advertising only to prevent deception. In its staff report on "Television Advertising to Children" (February 1978), however, the FTC contemplated regulation of some children's advertising, not because it deceived children, but because it was "unfair."

Concerned with the potentially unbounded regulation of nondeceptive commercial advertising on the basis of unfairness, Congress addressed this issue in two ways in section 11 of the FTC Improvements Act of 1980. First, the FTC's authority to issue a children's advertising rule based on unfairness was removed. (After conducting an evaluation of the basis for a children's advertising rule on a deception theory, the FTC terminated the children's advertising proceeding in 1981.) Second, Congress placed a moratorium on the FTC's use of unfairness in new section 18 rulemakings designed to regulate commercial advertising. The moratorium on new rulemaking permitted the FTC to continue to regulate commercial advertising on the basis of deception, and the Commission retained the authority to rely on unfairness in individual cases against advertisers under section 5 of the FTC Act. Because the unfairness standard for the regulation of commercial advertising practices goes beyond the elimination of misleading or deceptive commercial speech, it presents a Constitutional conflict with First Amendment protections for free speech. Section 10 of S. 1249, which makes permanent this moratorium on new section 18 rulemakings to regulate advertising based on unfairness, is motivated by the Committee's continued concern with the potential for abuse in this area.[7]

OVERVIEW OF ENFORCEMENT

The FTC's enforcement efforts have come under increasing criticism and numerous witnesses testified at the Committee's authorization hearing that the level of enforcement activity has decreased. This perception of diminished enforcement has led to suggestions for change.

The FTC's enforcement efforts have prompted some State law enforcement officials to undertake additional investigations and prosecutions. As fraudulent schemes grow more complex and extensive, however, they begin to take on a national flavor. A conflict may arise between the geographic boundaries which limit the jurisdiction of State law enforcement officials and the bondaries of such schemes.

Consequently, State attorneys general may find themselves pursuing the same malefactors and conducting parallel investigations. Given this situation, proposals have been advanced to increase the effectiveness of those efforts by, for example, extending FTC Act enforcement authority to State attorneys general and allowing a single State to obtain and enforce on a nationwide basis an order obtained in Federal court pursuant to the Act. Section 17 of S. 1249 addresses the question of Federal-State cooperation by requiring

[7] This restriction on section 18 rulemaking authority does not impede the Commission's ability to address new legal questions pertaining to commercial advertising in individual cases under section 5. As discussed in the section-by-section analysis under section 6, the U.S. Court of Appeals for the Ninth Circuit was incorrect to suggest that the Commission cannot use its adjudicative authority to address novel legal questions.

the FTC to review its statutory responsibilities with an eye toward identifying matters most appropriate for Federal action, and those more correctly addressed by State officials.

A provision was included in S. 677 in the 100th Congress to strengthen the FTC's commitment to its regional offices. Regional activity has been shown to be indispensable to FTC enforcement, and it is important to protect this aspect of the Commission's budget. Subsequent to passage of S. 677, the FTC agreed to a series of steps that would assure the continued importance of the regional offices; therefore, no such provision is included in S. 1249.

Another area of concern to the Committee is the FTC's enforcement of the Robinson-Patman Act. That Act was passed in 1936 following an FTC study and other information showing that independent retailers were disadvantaged in competing against grocery and drug store chains because the chains used their massive buying power to get much lower price quotations from manufacturers and wholesalers. The Robinson-Patman Act was primarily intended to benefit small merchants, by preventing large retail store chains from extracting discriminatory low prices in their purchasing.

On October 26, 1988, the FTC staff and Chairman Oliver published proposed amendments to the "Guides for Advertising Allowances and Other Merchandising Payments and Services", which were promulgated in May 1969. These Guidelines assist businesses in complying with section 2 (d) and (e) of the Robinson-Patman Act (15 U.S.C. 13 (d) and (e)), which generally requires that sellers provide or reimburse all competing buyers for payments or services to promote the resale of such products on proportionally equal terms. Testimony was received from some affected industries indicating their belief that the current Guidelines work well in conducting their operations in accordance with the Robinson-Patman Act. The Committee will evaluate carefully any action taken by the FTC on these Guidelines, to ensure that any amendment to the Guidelines does not undermine the objectives of the Robinson-Patman Act and that the FTC's role in enforcing the Act is maintained.

The FTC must play a vital role in preventing anti-competitive practices through enforcement of the statutes under its jurisdiction. For example, the Committee's interest in preventing predatory pricing is reflected in section 14 of S. 1249, which requires a report on the FTC's activities in the area of predatory pricing. The Committee also requires the FTC to submit a similar report on resale price maintenance. This and other information will assist the Committee to monitor the FTC's performance in these areas.

Legislative History

S. 1249 was introduced by Senator Bryan, with Senators Hollings, Gore, Breaux, and Ford as cosponsors, on June 22, 1989, following hearings on June 7 and 8, 1989. On July 25, 1989, the Committee, in open executive session, without objection ordered S. 1249 to be reported, without amendment.

In the 100th Congress, Senator Gore introduced S. 677, the predecessor to the present authorization legislation, on March 6, 1987, following hearings on February 4 and 5, 1987 (Serial No. 100–2). S. 677 was ordered reported by the Committee on March 10, 1987 (S.

Rept. 100-31), and was passed by the Senate on April 8, 1987. The bill was passed by the House of Representatives on October 7, 1987, but differences between the Senate and House versions of the bills were not resolved in the Senate and House Conference on the legislation.

In the 99th Congress, Senator Kasten introduced S. 1078 on May 6, 1985, following a hearing on April 24, 1985 (Serial No. 99-151). S. 1078 was ordered reported by the Committee on May 9, 1985 (S. Rept. 99-81). The Senate passed the legislation on July 26, 1985, but issues in the legislation were not resolved in the Senate and House Conference.

In the 98th Congress, Senator Packwood introduced S. 1714, authorization legislation, on July 29, 1983. General hearings on the reauthorization of the FTC were conducted before the Committee on March 16, 17, and 18, 1983 (Serial No. 98-19), and on March 18 and 19, 1982 (Serial No. 97-108). S. 1714 was ordered reported by the Committee on August 2, 1983 (S. Rept. 98-364). The 98th Congress adjourned, however, without Senate action on S. 1714.

Summary of Major Provisions

SECTION 2.—UNFAIR METHODS OF COMPETITION

This section contains a new statutory limitation on the Commission's authority with respect to certain regulatory functions of the States. It adds a new subsection to section 5 of the FTC Act, which provides that the "State action" antitrust immunity developed by the courts in litigation under the Sherman Act would be applied also to the Commission's "unfair methods of competition" cases.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 24 to the FTC Act to make permanent temporary prohibitions against Commission studies, investigations, or prosecutions of agricultural cooperatives for conduct falling within the limited antitrust immunity provided by the Capper-Volstead Act. FTC studies or investigations of marketing orders are also prohibited.

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal the Commission's authority under section 18(h) of the FTC Act to compensate public participants in FTC rulemaking proceedings.

SECTION 5.—KNOWING VIOLATIONS OF ORDERS

This section would amend section 5(m)(1)(B) of the FTC Act (which gives the Commission the authority to go to Federal court to seek civil penalties against one company for a knowing violation of the holding of a prior case against a different company) to permit the defendant to challenge in court the legal basis for the FTC's prior order, thereby codifying the U.S. District Court decision in *United States* v. *Braswell, Inc.,* 1981-82 Trade Cas. (CCH) 64,325 N.D. Ga. 1981), *aff'd,* No. 81-9666 (11th Cir. March 3, 1982).

SECTION 6.—PREVALENCE OF UNLAWFUL ACTS OR PRACTICES

This section would amend section 18(b) of the FTC Act to provide that the Commission may issue a notice of proposed rulemaking only where it has reason to believe that the challenged conduct is prevalent in the industry.

SECTION 7.—EFFECTIVE DATE OF ORDERS

This section would amend section 5(g) of the FTC Act to end the present requirement for an automatic stay of Commission cease-and-desist orders pending appeal, and, with some exceptions, provide instead that Commission orders may be stayed by the FTC itself or by the courts (within their discretion) during the appeal process. This section would conform FTC practice to that of other Federal agencies.

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would extend the "civil investigative demand" (CID) document procedures contained in section 20 of the FTC Act, which now apply to FTC investigations under its consumer protection authority, to antitrust investgations conducted by the Commission. Principally, this amendment would have the effect of requiring that FTC antitrust investigations be conducted prusuant to section 20, as are consumer protection investigations.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would add a new subsection to section 5 of the FTC Act limiting unlawful "unfair acts or practices" to acts or practices that have caused or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This definition would circumscribe the FTC's consumer unfairness authority for both rulemaking and case-by-case adjudications.

SECTION 10.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to make permanent the temporary provision prohibiting the FTC from initiating any new rulemaking proceeding prohibiting or otherwise regulating any commercial advertising on the basis that such advertising is an unfair act or practice.

SECTION 11.—VENUE; SERVICE OF PROCESS

This section would amend section 13 of the FTC Act to permit defendants from different districts to be brought into FTC actions in Federal district court. In addition, service of process provisions are added, to facilitate notification for parties to the actions.

SECTION 12.—PHYSICAL EVIDENCE AND CIVIL INVESTIGATIVE DEMANDS

This section would amend section 20 of the FTC Act to permit the FTC to issue civil investigative demands for physical evidence (including medical devices, drugs, audio/video recordings, and the

like). Currently, the FTC is permitted to secure only documentary material.

SECTION 13.—REPORT ON RESALE PRICE MAINTENANCE

This section would require the FTC to report semi-annually to the Senate on Commerce, Science, and Transportation and the House Energy and Commerce Committee on FTC enforcement activities in the area of resale price maintenance.

SECTION 14.—REPORT ON PREDATORY PRICING PRACTICES

This section would require the FTC to report semi-annually to the House and the Senate Commerce Committees on FTC enforcement activities in the area of predatory pricing.

SECTION 15.—INTERVENTION BY COMMISSION IN CERTAIN PROCEEDINGS

This section would prohibit funding of FTC intervention in the proceedings of any Federal or State agency unless the FTC advises the Senate Commerce Committee and the House Energy and Commerce Committee.

SECTION 16.—RESOURCE ALLOCATION STUDY

This section would require the FTC to study the manner in which its resources are allocated, including supervisory/non-supervisory positions and research functions, and report to the Senate Commerce Committee and the House Energy and Commerce Committee within six months.

SECTION 17.—FEDERAL-STATE COOPERATION

This section would require the FTC to identify those areas within its jurisdiction that are most appropriately enforced by the FTC, and those which the States or localities might more effectively enforce. This identification will be conducted in consultation with the State attorneys general, and will consider the resources available to the FTC and the States.

SECTION 18.—AUTHORIZATION OF APPROPRIATIONS

This section would reauthorize the FTC for three years at funding levels of $69,580,000 for fiscal year 1990; $72,780,000 for fiscal year 1991; and $76,128,000 for fiscal year 1992. For fiscal years 1990 and 1991, such additional amounts are also authorized as may be necessary for increases in salary, pay, and other employee benefits authorized by law.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 9, 1989.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 1249, the Federal Trade Commission Act Amendments of 1989.

If you wish further details on this estimate, we will be pleased to provide them.

ROBERT D. REISCHAUER,
Director.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1249.
2. Bill title: Federal Trade Commission Act Amendments of 1989.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, August 1, 1989.
4. Bill purpose: S. 1249 would authorize the appropriation of up to $69.6 million for fiscal year 1990, $72.8 million for fiscal year 1991, and $76.1 million for fiscal year 1992 to carry out the programs of the Federal Trade Commission (FTC). In addition, the bill would authorize additional funds for fiscal years 1990 and 1991 for increases in salary, pay, and other employee benefits as authorized by law. The bill would also make a number of changes to FTC policies and procedures, and would require the agency to undertake a number of studies.

Appropriations to date for fiscal year 1989 are $66.2 million, and the President is requesting a 1990 appropriation of $69.6 million.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1990	1991	1992	1993	1994
Authorization level:					
Specified (Function 370)	69.6	72.8	76.1		
Estimated (Function 920)	1.4	2.3			
Total	71.0	75.1	76.1		
Estimated outlays	65.3	74.8	76.0	6.1	

The costs of this bill fall within budget function 370.

Basis of estimate: For the purposes of this estimate, it was assumed that the full amounts authorized would be appropriated prior to the beginning of each fiscal year. The increases for salary, pay, and other employee benefits authorized by law in 1990 and 1991 are estimated consistent with the assumptions of the Concurrent Resolution on the Budget for Fiscal Year 1990 (H. Con. Res. 106). Outlays reflect historical spending patterns for the ongoing activities of the FTC.

6. Estimated cost to State and local governments: None.
7. Estimated comparison: None.

8. Previous CBO estimate: None.
9. Estimate prepared by: Douglas Criscitello.
10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

This legislation is expected to reduce the burdens of FTC regulation, principally by limiting the Commission's jurisdiction over certain classes of persons, activities, and entities, and by circumscribing certain types of authority. Sections 2 and 3 limit the Commission's "unfair methods of competition" authority over State-regulated activities and agricultural cooperatives, respectively. Any adverse economic impact of Commission regulation is likely to be reduced by clarifications of FTC authority contained in other sections, including sections 6, 9 and 10. This legislation is not likely to affect substantially the privacy of individuals or increase paperwork requirements.

Section-by-Section Analysis

SECTION 1.—SHORT TITLE

This section contains the short title of the legislation, the "Federal Trade Commission Act Amendments of 1989".

SECTION 2.—UNFAIR METHODS OF COMPETITION

This section contains a new statutory limitation on the FTC's "unfair methods of competition" authority. It would amend section 5 of the FTC Act to add a new subsection providing that the Commission shall not have any authority to find a method of competition to be an unfair method of competition if, in any action under the Sherman Act,[8] such method of competition would be held to constitute "State action."

Beginning with the Supreme Court's 1943 decision in *Parker* v. *Brown*,[9] courts have held anticompetitive conduct to be exempt from antitrust challenge under the Sherman Act if, first, the conduct was undertaken pursuant to clearly articulated and affirmatively expressed State policy to displace competition and, second, this conduct was actively supervised by the State.[10] The purpose of this section is to eliminate any uncertainty as to the applicability of the judicially-developed "State action" immunity to the Commis-

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[8] 15 U.S.C. 1-7.
[9] 317 U.S. 341 (1943).
[10] See, e.g., *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *City of Lafayette* v. *Louisiana Power and Light Co.*, 435 U.S. 389 (1978); *California Retail Liquor Dealers Ass'n* v. *Medical Aluminum, Inc.*, 445 U.S. 97 (1980); *Town of Hallie* v. *City of Eau Claire*, 105 S. Ct. 1713 (1985); *Southern Motor Carriers Rate Conference* v. *United States*, 105 S. Ct. 1721 (1985). (In *Southern Motor Carriers*, the Supreme Court recently held that the collective ratemaking activities of motor common carriers in certain States, although not compelled by the States, were immune from Federal antitrust liability, because the anticompetitive conduct was authorized pursuant to clearly articulated State policies and was the subject of active supervision by the States.)

sion's "unfair methods of competition" authority, just as this immunity is applicable presently to actions under the Sherman Act.

In the past, the FTC has recognized that adjudications pursuant to its "unfair methods of competition" authority are subject to the "State action" doctrine, which rests on principles of federalism and State sovereignty.[11] The Committee intends that, as courts continue to refine and develop the "State action" immunity, these refinements and changes will apply to such future Commission adjudications as well.

SECTION 3.—AGRICULTURAL COOPERATIVES

This section would add a new section 24 to the FTC Act, making permanent section 20 of the FTC Improvements Act of 1980, which prohibited the FTC temporarily from any study or investigation of agricultural marketing orders, or any study, investigation, or prosecution of agricultural cooperatives for conduct which the Capper-Volstead Act exempts from the antitrust laws. As stated in the Conference Report for section 20 of the 1980 Act, the intent of the section is "to ratify the spirit and intent of the Capper-Volstead Act."

SECTION 4.—COMPENSATION IN PROCEEDINGS

This section would repeal section 18(h) of the FTC Act, the FTC authority to provide compensation for reasonable attorneys' fees, expert witness fees, and other costs to participants in section 18 trade regulation rulemakings. No refunds have been appropriated for this program since fiscal year 1980.

SECTION 5.—KNOWING VIOLATIONS OF ORDERS

The purpose of this section is to clarify the scope of the FTC's existing authority under section 5(m)(1)(B) of the FTC Act to obtain civil penalties against persons who violate the holdings of prior cases. Section 5(m)(1)(B) provides that the FTC may obtain a civil penalty against a person who violates the holding of a prior case—even though that person was not a party—if the Commission can prove that the violator had actual knowledge that the practice was unfair or deceptive and unlawful.

Subsection (a) of this section would amend section 5(m)(1)(B) to make clear that such nonrespondent liability may not be imposed where such person has violated the standards of an outstanding consent agreement. The Committee intends that a case settled by consent agreement would not qualify as a predicate for a section (5)(m)(1)(B) proceeding, because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding. By contrast, the FTC issues a final cease-and-desist order only after all factual and legal issues have been fully adjudicated before an administrative law judge, subject to review by the Commission. Thus, it is the FTC's current practice not to seek pen-

[11] See, e.g., *Massachusetts Furniture and Piano Movers*, 102 F.T.C. 1176 (1983), *appeal filed sub nom. Massachusetts Furniture and Piano Movers* v. *FTC*, No. 83-1892 (1st Cir. filed Dec. 6, 1983).

alties based upon nonrespondent violations of outstanding consent agreements, and this subsection codifies this practice.

Subsection (b) would amend section 5(m)(2) to make clear that, where the FTC seeks a civil penalty based on a violation of a holding in a case to which the defendant was not a party, the defendant may challenge in the penalty suit the validity of the Commission's legal determination of what constitutes an unfair or deceptive practice under section 5(a)(1). The court would examine the FTC's interpretation under the appropriate standard of review.[12] The FTC has already conceded in litigation under section 5(m)(1)(B), and one court has so held, that defendants in section 5(m)(1)(B) cases must be given this right.[13] Because subsection (b) is intended to codify the FTC's current policy, as developed in the *Braswell* litigation, the Committee intends that subsection (b) apply to cases currently in litigation as well as cases initiated under section 5(m)(1)(B) following enactment of this legislation.

SECTION 6.—PREVALENCE OF UNLAWFUL ACTS OR PRACTICES

This section would amend section 18(b) of the FTC Act to reemphasize the importance of prevalence as a basis for initiating a trade regulation rulemaking. Although the FTC has generally exercised appropriate discretion in initiating rulemaking proceedings, the Committee believes a statutory standard to guide the exercise of this discretion is desirable.

The section provides that the FTC may issue a notice of proposed rulemaking only if it has "reason to believe" that unfair or deceptive acts or practices are "prevalent." Prevalence exists only if the FTC has issued cease and desist orders regarding acts and practices that are addressed by the rule, or if other information available to the FTC indicates a pattern of unlawful conduct. The "reason to believe" standard is intended to bar any judicial review.

The FTC should not initiate a trade regulation rulemaking where only isolated and insignificant violations have occurred. Rulemaking is permissible only where there have been several cease-and-desist orders or there is other evidence of a pattern of unlawful conduct. The Commission, of course, may consider the extent to which unlawful conduct causes significant economic injury in deciding whether to commence a rulemaking proceeding. It is the combined impact of the injury and the violations found which should be considered.

Where unlawful acts or practices are not "prevalent" within the meaning of this section, the FTC may proceed using its section 5 adjudicative authority, even if the Commission is thereby creating new law. The U.S. Court of Appeals for the Ninth Circuit was plainly incorrect to suggest that the Commission "exceed(s) its authority by proceeding to create new law by adjudication rather than rulemaking" and acts improperly by rendering a novel interpretation of law in an adjudication where the "rule of the

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[12] See, e.g., *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

[13] *United States* v. *Braswell, Inc.*, 1981-82 Trade Cas (CCH) 64,325 (N.D. Ga. 1981), aff'd, No. 81-9666 (11th Cir. March 3, 1982).

case * * * will have general application." [14] Because this suggestion is inconsistent with congressional intent in conferring adjudicative authority upon the Commission, the Committee does not believe it poses any barrier to the FTC's use of adjudication to address novel legal questions or any barrier to effective application of this section.

SECTION 7.—EFFECTIVE DATE OF ORDERS

This section would amend section 5(g) of the FTC Act to make most FTC cease-and-desist orders effective 60 days after service unless stayed by the Commission or a court.

Currently, FTC cease-and-desist orders become final within 60 days only if no petition or review has been filed. Otherwise, the effective date of the entire order must await the decision of the Court of Appeals or the Supreme Court, as the case may be. Under present law, unless the Court of Appeals grants extraordinary ancillary relief, a respondent may continue to engage in conduct which the FTC has determined unlawful until ultimate disposition of a petition for review, which often takes years.[15] Thus, in some cases, respondents are encouraged to file petitions for review, based in frivolous or other unmeritorious claims, largely for the purpose or effect of delay. This section would reduce the incentive to file petitions for review simply for dilatory purposes.

Moreover, as many challenges to FTC decisions relate only to certain provisions of a cease-and-desist order, there is no compelling reason to delay the effective date of the order in its entirety in each case, as at present.

The Committee believes that the proposed amendment offers sufficient protection to those parties with legitimate reasons for noncompliance by permitting them to obtain a stay of the order from the FTC in the first instance, the U.S. Court of Appeals before which a petition to review is pending, or the Supreme Court if a petition for certiorari has been filed. To insure against delay in action upon applications for a stay, this section would permit the Court of Appeals to consider a stay request if the FTC has not acted within 30 days of the receipt of such an application.

The procedure contemplated by this section is the norm for other Federal agencies and also reflects the practice in the Federal court system. For example, similar provisions are found in the statutes of the Environmental Protection Agency, the Federal Communications Commission, and the Securities and Exchange Commission.[16]

Because of the substantial impact on business operations of a divestiture order, this section would retain the current mandatory stay requirements as to such orders. This section also retains the current definition of finality with respect to the initiation of con-

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[14] *Ford Motor Co.*, v. *FTC*, 673 F.2d 1008 at 1011 (9th Cir.), cert. denied, 459 U.S. 999 (1982). See K. Davis, Administrative Law Treaties, 1982 Supplement, section 7.25 at 182-83 and cases cited.

[15] Chairman Miller testified that: "Of all cases finally decided by a court of appeals during the four-year period from January 1, 1977, over two-thirds of the Commission's orders were substantially affirmed. Yet the delay in the effectiveness of these affirmed orders ranged from 18 to 48 months and averaged approximately 29 months." Prepared Statement of James C. Miller III, March 18, 1982, at 6.

[16] See e.g., 7 U.S.C. 135b(d) and 42 U.S.C. 4915(c) (EPA); 47 U.S.C. 402 (FCC); 29 U.S.C. 160(g)(NLRB); and 15 U.S.C. 77i(b) (SEC).

sumer redress actions and actions arising from knowing violations of the holding of FTC decisions by nonparties.

SECTION 8.—CIVIL INVESTIGATIVE DEMANDS

This section would amend section 20 of the FTC Act to require that all FTC law enforcement investigations be conducted pursuant to civil investigative demand procedures set out in that section. Under current law, the CID procedures are limited to the FTC's consumer protection investigations. Because these procedures have worked well at the Commission, and because the Department of Justice has successfully used CIDs in its antitrust investigations, the Committee believes that the CID procedures should apply to the FTC's antitrust investigations as well. The Committee intends no change in the scope or usage of CIDs as discussed in the report of the provision enacted as section 20.[17] The Committee does not intend this legislation to apply to subpoenas outstanding at the time this legislation becomes effective or to investigative resolutions issued before the effective date.

SECTION 9.—DEFINITION OF UNFAIR ACTS OR PRACTICES

This section would amend section 5 of the FTC Act to add a new subsection limiting the FTC's authority over "unfair acts or practices" to acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition. This limitation would apply both to adjudications under section 5 and rulemakings under section 18.

This section is intended to codify, as a statutory limitation on unfair acts or practices, the principles of the Commission's December 17, 1980 policy statement on unfairness, reaffirmed by letter of the FTC dated March 5, 1982. Since the FTC's policy statement itself is based on the Commission's decided cases and rules, this section codifies existing law. The incorporation of these criteria should enable the FTC to proceed in its development of the law of unfairness with a firm grounding in the precedents decided under this authority, and consistent with the approach the FTC and the courts have taken in the past. The Committee believes this codification is necessary in order to provide the FTC, its staff, regulated business, and reviewing courts greater guidance on the meaning of unfairness and to prevent a future Commission from abandoning the principles of the December 17, 1980 and March 5, 1982 letters.

Consumer injury may be "substantial" under this section if a relatively small harm is inflicted on a large number of consumers or if a greater harm is inflicted on a relatively small number of consumers. In accordance with the FTC's December 17, 1980 letter, substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks. Emotional impact and more subjective types of harm alone are not intended to make an injury unfair.

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[17] See S. Rept. 96-500, 96th Cong., 1st Sess. pp 23-36 (1979). The Commission would continue to use subpoena authority under section 9 of the FTC Act in adjudicatory proceedings and in investigations to determine whether an outstanding order to cease and desist has been violated.

In determining whether a substantial consumer injury is outweighed by the countervailing benefits of a practice, the Committee does not intend that the FTC quantify the detrimental and beneficial effects of the practice in every case. In many instances such a numerical benefit-cost analysis would be unnecessary; in other cases, it may be impossible. This section would require, however, that the FTC carefully evaluate the benefits and costs of each exercise of its unfairness authority, gathering and considering reasonably available evidence.

The Committee knows that State attorneys general have expressed a concern that the limitation on unfairness in this section may be construed to affect provisions in State statutes or State case law.

Since the mid-1960's, virtually every State has enacted statutes prohibiting deceptive practices, while many States also prohibit unfair practices. These State consumer protection acts are enforced almost exclusively through recourse to State courts. Many of the statutes direct courts to be guided by interpretations of the FTC Act. In other States, the courts have interpreted these laws consistently with developments under Federal law. State courts have applied the unfairness standard in a variety of contexts including unconscionable pricing practices, high pressure sales tactics, uninhabitable living conditions in leased premises, and abusive debt collection practices.

The Committee intends no effect on those or other developments under State law. This section represents a consensus view of an appropriate codification of Federal standards, undertaken after careful assessment of the FTC's past activities. The Committee's action should not be understood as suggesting that the criteria in this section are necessarily suitable in the further development of State unfairness law or that the FTC's future construction of these criteria delimits in any way the range of State decisionmaking. Sound principles of federalism limit the impact of this section to the Commission only.

SECTION 10.—COMMERCIAL ADVERTISING

This section would amend section 18 of the FTC Act to provide that the FTC shall have no authority under that section to initiate any new rulemaking proceeding which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial advertising on the basis of a determination by the FTC that such commercial advertising constitutes an unfair act or practice in or affecting commerce.

Under this section, the FTC would continue to have the authority to rely on unfairness to prohibit or regulate commercial advertising in individual case adjudication under section 5 of the FTC Act. The Commission would also continue to have the authority to prohibit or regulate commercial advertising based upon a deception theory, through both section 5 case adjudications and section 18 rulemakings. This section thus would make permanent the similar limitation on new section 18 rulemakings enacted on a temporary basis in section 11 of the FTC Improvement Act of 1980.

For purposes of this section, the term "commercial advertising" denotes promotional messages that appear in broadcast or print media, including promotional mailings. It is not intended to cover oral representations, representations in credit contracts, debt collection notices, and the like which would remain subject to the FTC's unfairness jurisdiction.[18]

Further, this section is intended to apply to regulation by the FTC of the content of commercial advertising, and not to regulation of practices that may somehow pertain to such advertising but are not themselves advertising. For example, this section would not affect the FTC's authority to regulate practices that ban or restrain commercial advertising, or to regulate "practices" that are unfair; e.g., placing sample razor blades in a newspaper insert.

The Committee believes that the limitation contained in this section is warranted because the constitutional protection accorded to non-deceptive commercial speech is threatened by the broad grant of "unfairness" jurisdiction contained in section 18 of the FTC Act. The fact that "purely" commercial speech is within the protection of the First Amendment is no longer subject to doubt.[19] In Supreme Court decisions defining the limits of governmental power to regulate commercial speech, the Court has made it clear that government retains the power to proscribe misleading or deceptive advertising.

The "Unfairness" standard in section 18 has no proper place in the regulation of commercial speech as the standard is too vague to avoid an unacceptable risk of abridging First Amendment principles of free speech, and does not take into account the mandate that the least restrictive form of regulation must be used consistent with meeting the substantial governmental interest involved.[20] The Committee is particularly concerned that the use of unfairness authority when applied on an industry-wide basis in rulemaking proceedings to too broad. By contrast, when the FTC proceeds using its section 5 adjudicative authority, the FTC's remedial order may be better tailored to the facts of the specific case before the Commission. Moreover, the FTC's use of the unfairness standard has survived litigation in cases dealing with unfair methods of competition or unfair acts of practices, not advertising.[21] Because the unfairness standard in section 18 goes beyond the elimination of misleading or deceptive commercial speech, it raises an unacceptable potential for conflict with First Amendment principles.

Moreover, the Committee is persuaded that the FTC's existing authority to prohibit unfair or deceptive acts or practices under section 5 and deceptive practices under section 18 is sufficient to permit the FTC to police abusive advertising practices. The Committee believes that illegal advertising practices prohibited by the FTC in the past could be reached by this authority. Consequently,

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[18] See, e.g., *Horizon Corp.* (Dkt. No 9017, May 15 1981); *Spiegel, Inc.* v. *FTC*, 540 F. 2d 287 (7th Cir. 1976); *General Motors Corp.*, 95 F.T.C. 825 (1980).

[19] *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)

[20] *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York*, 447 U.S. 557 (1980).

[21] See e.g., *FTC* v. *R.F. Keppel & Bros.*, 291 U.S. 304 (1934); *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

the Committee believes this amendment does not in any way undercut appropriate FTC law enforcement but only protects against unwarranted and constitutionally sensitive actions against commercial advertising in the future.

While it appears that the Commission, in the past, has attacked certain abusive advertising practices as "unfair," it has also attacked these same practices as "deceptive," and this section should, therefore, not result in legalization of such practices in the future. One example is the FTC's advertising substantiation program. Unsubstantiated advertising was originally addressed as an "unfair" practice,[22] but subsequent FTC decisions have firmly established that dissemination of unsubstantiated advertisements is a deceptive practice as well.[23] Also, the Commission has clarified the "deception" basis for its ad substantiation doctrine in its Ad Substantiation Policy Statement.[24]

It should be noted that in advocating enactment of related legislation in testimony before the Committee, representatives of the major advertising trade associations said that they did not intend "to affect in any way the FTC's power to require that objective claims made in advertisements must have prior substantiation". This section is not intended to impair in any way the Commission's advertising substantiation program.[25]

A second example relates to commercial advertising depicting unsafe or unlawful activity.[26] While such cases have been addressed in the past as both "unfair" and "deceptive" practices, representatives of the advertising industry have indicated that they clearly could be brought under a deception theory. The Committee believes that, to the extent such advertisements are deceptive because they fail to reveal material facts, the advertisements may be deceptive.

SECTION 11.—VENUE; SERVICE OF PROCESS

Subsection (a) of this section amends section 13 of the FTC Act to permit defendants from different districts to be brought into FTC actions in Federal district court. In addition, service of process provisions are added, to facilitate notification for parties to the actions.

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[22] See, e.g., Pfizer, Inc., 81 F.T.C. 23 (1972).

[23] E.g., National Comm'm on Egg Nutrition, 88 FTC 89, 191 (1976), *aff'd* 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Sears Roebuck & Co.*, 95 FTC 406, 520–21 (1980), *aff'd* 676 F.2d 385 (9th Cir. 1982).

[24] 49 Fed. Reg. 309–399 (Aug. 7, 1984).

[25] In approving the ad substantiation program, the Committee intends to incorporate the general scope of this program as it has been endorsed by the Commission and the courts. We recognize that its application may require further elaboration by the Commission and the courts. The Committee has not reviewed, and takes no position, on the ETC staff position in any pending FTC ad substantiation cases.

[26] *See e.g., Uncle Ben's Inc.*, 89 FTC 131 (1977) (ad portrayed children cooking at a stove); *Mego Industries, Inc.*, 92 FTC 186 (1978) (ad portrayed child using electric applicance near sink of water); *General Foods Corp.*, 86 FTC 831 (1975) (ad portrayed Euell Gibbons eating wild plants in ad for Grape-Nut cereal); *AMF, Inc.*, 95 FTC 310 (1980) (ad showed children riding bicyles in unsafe manner). The cases were consent settlements and were never litigated. Cases in which advertisements depict usage of a product in an unsafe or inappropriate manner have occurred infrequently in the past, and this is an area in which the Committee hopes that there will be continued cooperation between the Commission and industry.

Subsection (b) of this section provides that process may be served by various means, including to an officer of a corporation, delivery to the office of a corporation, or through mail.

The FTC testified that this authority will be of assistance in its efforts to combat consumer fraud. According to the FTC, consumer fraud occurs frequently and involves billions of dollars each year. Health fraud, telemarketing scams, and the like are involved, and the FTC has indicated that such fraud is on the increase. One of the greatest difficulties identified by the FTC is combating consumer fraud is its inability to sue multiple defendants in a variety of jurisdictions. The FTC has some authority under current law in this area. Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC. The FTC can go into court ex parte to obtain an order freezing assets, and is also able to obtain consumer redress. Section 13(b) also provides that any such suit is to be brought in the district where the defendant resides or transacts business. The FTC has used its section 13(b) injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the bill should assist the FTC in its overall efforts.

SECTION 12.—PHYSICAL EVIDENCE AND CIVIL INVESTIGATIVE DEMANDS

This section amends section 20 of the FTC Act to permit the FTC to issue civil investigative demands for physical evidence (including medical devices, drugs, audio/video recordings, and the like).

In the FTC Improvements Act of 1980, a new section 20 was added to the FTC Act granting the FTC authority to issue civil investigative demands. However, that section limited the authority for such CIDs to documentary material.

The FTC has testified that broadening the CID authority to cover physical evidence would assist it in its efforts to combat consumer fraud. The same procedures which are set forth in section 20 would be utilized for the production of physical evidence under the amendments made by this section. This new authority will strengthen the FTC's ability to identify and punish persons who engage in conduct that is the subject of section 20 of the FTC Act.

SECTION 13.—REPORT ON RESALE PRICE MAINTENANCE

This section requires the FTC to submit a detailed report twice a year during fiscal years 1990, 1991, and 1992 on its enforcement of the law against resale price maintenance.

Since 1911, resale price maintenance—the fixing of retail prices by manufacturers—has been deemed by the courts to be a *per se* violation of the antitrust laws. Congress affirmed this view when it repealed authorizaiton for State Fair Trade laws in 1975, and expressed its intent to reapply the per se rule across the country.

Notwithstanding this clear history of the law, some members of the FTC have expressed their disapproval of the *per se* rule. As the Committee learned in the course of hearings, this view has been reflected in a reduction in the Commission's law enforcement activity.

The Committee is concerned about the lack of law enforcement in this area. The current prohibition of resale price maintenance is

intended to protect both consumers (who seek low retail prices) and retailers (who seek the right to compete). In exercise of its oversight powers, the Committee consequently has mandated that the FTC forward detailed information about its activities regarding resale price maintenance. Such information may serve as a basis for other appropriate legislative action.

SECTION 14.—REPORT ON PREDATORY PRICING PRACTICES

This section requires the FTC to report twice yearly during fiscal years 1990, 1991, and 1992 to the Senate Commerce Committee and the House Committee on Energy and Commerce regarding its enforcement activity relating to predatory pricing. The section specifies items to be included in the report, such as complaints made to the Commission, investigations opened, and other actions taken. The report is also to include any evaluation obtained by the FTC covering the potential impacts of predatory pricing upon businesses (including small businesses). The section states that the report should not reveal the identity of persons or companies complained about or those subject to investigation that have not otherwise been made public; this will enable the Committee to make public the information provided by the FTC if the Committee chooses to do so.

SECTION 15.—INTERVENTION BY COMMISSION IN CERTAIN PROCEEDINGS

Section 15(a) would prohibit the expenditure of funds, during the period of this authorization, "for the purpose of submitting statements to, appearing before, or intervening in the proceedings of, any Federal or State agency" unless the FTC advises the Senate Commerce Committee and the House Energy and Commerce Committee in advance of such action. The Committee understands that time is often of the essence when the FTC submits its comments to other governmental entities. By this provision the Committee does not intend to impose unduly restrictive administrative requirements on the Commission. Therefore, the Committee believes that the FTC would be in compliance with this provision if it provides notice to the specified Senate and House Committees as soon as the FTC receives notice of a staff recommendation to authorize or make an appearance or submit a statement or intervene in a proceeding.

Since this provision was approved by the Senate, and a related provision approved by the House of Representatives, in the 100th Congress, the FTC has adopted internal procedures for intervention activities that have imposed more consistent requirements on the FTC's intervention activities. The Committee believes that these procedures are an improvement over the manner in which such interventions were handled previously, and that the notification required by this section will assist the Committee in its continuing oversight of this function.

The FTC should apprise the Committee through its budget submissions of resources allocated to intervention activity.

SECTION 16.—RESOURCE ALLOCATION STUDY

This section instructs the FTC to study the manner in which its resources are allocated, including supervisory/non-supervisory positions and research functions, and report to the Senate Commerce Committee and the House Energy and Commerce Committee within six months of enactment of the legislation.

The Kirkpatrick Committee report found that the FTC has not allocated its resources as wisely as possible in recent years. According to the report, "as the Commission has shrunk in size, its staffing patterns have made it top-heavy, both in the operating bureaus and at the Commission level. Moreover, an excessive percentage of supervisors is not just a waste of resources. It also can interfere with an agency's effectiveness by making the decision-making process more cumbersome".[27] Particularly in a time of budgetary constraints, the Committee believes that the FTC must allocate its resources so as to fulfill its statutory responsibilities effectively. The information obtained from this report will be of assistance to the Committee in conducting future oversight and considering legislative proposals.

SECTION 17.—FEDERAL-STATE COOPERATION

This section requires the FTC to identify those areas within its jurisdiction that are most appropriately enforced by the Commission, and those which the States or localities are better situated to enforce. This idenfitication will be conducted in consultation with the State attorneys general, and will consider the resources available to the FTC and the States.

In recent years, tension has been evident between some members of the FTC and State officials. Also, witnesses have suggested that States have increased their activity due to the FTC's lack of presence in the marketplace. This State activity, according to some sources, has meant inconsistent enforcement and interpretations, which have required consumers and businesses to be uncertain as to their rights or obligations under the law.

The Kirkpatrick Committee report echoed this view, stating that the "current liaison arrangement between the FTC and the states should be improved." According to the report, "the States' primary mission should be those practices that harm consumers within a single state; the FTC's special mission should be those practices that harm consumers in many states * * * Where the FTC is challenging what is essentially a local practice, the enforcement process may be unduly expensive and insufficiently responsive to local concerns. Conversely, where one or more states challenge what are essentially interstate practices, there is a significant risk that the enforcement process will be unnecessarily cumbersome, that inconsistent standards will create uncertainty, and that the interests of consumers nationwide will be optimally served." [28]

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[27] Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 1989, at 95.

[28] Id. at 38-39.

The Committee believes that the information obtained from this evaluation will assist it in reviewing the FTC's performance, and in considering future legislative proposals.

SECTION 18.—AUTHORIZATION OF APPROPRIATIONS

This section would reauthorize the FTC for three years at funding levels of $69,580,000 for fiscal year 1990, $72,780,000 for fiscal year 1991, and $76,128,000 for fiscal year 1992. For fiscal years 1990 and 1991, such additional amounts are also authorized as may be necessary for increases in salary, pay, and other employee benefits authorized by law.

SECTION 19.—EFFECTIVE DATE

This section states that, unless otherwise provided, provisions of this legislation become effective on the date of enactment. The amendment made by section 23 of S. 1249, which pertains to the FTC's "unfair methods of competition" authority, applies only with respect to cease-and-desist orders issued under section 5 of the FTC Act (15 U.S.C. 45) after the date of enactment. Section 6 (pertaining to prevalence and unlawful acts or practices) and section 10 (pertaining to the unfairness standard and commercial advertising) apply only to rulemaking proceedings initiated after the date of enactment. Section 7, which pertains to the effective date of cease-and-desist orders, and section 9 of this legislation, which defines "unfair acts or practices", apply only with respect to cease-and-desist orders issued under section 5 of the FTC Act (15 U.S.C. 45), or to rules promulgated under section 18 of the FTC Act (15 U.S.C. 57a), after the date of enactment.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL TRADE COMMISSION ACT

Section 5 of That Act

SEC. 5. (a)(1) * * *
(2) through (3) * * *
(b) through (f) * * *
(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

[(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court

of appeals, and no petition for certiorari has been duly filed; or]

(2) Upon the sixtieth day after such order is served, if a petition for review has been duly filed except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the thirty-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the applications; or

(C) the Supreme Court, if an applicable petition for certiorari is pending; or

[(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or]

(3) For purposes of section 19(a)(2) and section 5(m)(1)(B), if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the offer of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed; or

[(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.]

(4) In the case of an order requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of thirty days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) through (l) * * *

(m)(1) (A) * * *

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order,* with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) (1) * * *

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. *Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).*

(3) * * *

(n) The Commission shall not have any authority to find a method of competition to be an unfair method of competition under subsection (a)(1) if, in any action under the Sherman Act, such method of competition would be held to constitute State action.

(o) The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Section 13 of That Act

SEC. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on reivew, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in

the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business. *Whenever it appears to the court that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, the court may cause such person, partnership, or corporation to be summoned without regard to whether they reside or transact business in the district in which the suit is brought, and to that end process may be served in any district.*

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business. *Whenever it appears to the court that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, the court may cause such person, partnership, or corporation to be summoned without regard to whether they reside or transact business in the district in which the suit is brought, and to that end process may be served in any district.*

(c) Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corpora-

tion at his, her, or its residence, principal office, or principal place of business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same, and the return post office receipt for such process mailed by registered mail or certified mail as provided in this subsection shall be proof of the service of such process.

[(c)] *(d)* Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

Section 18 of That Act

SEC. 18. (a)(1) Except as provided in [subsection (i)] *subsection (h)*, the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) * * *

(b)(1) * * *

(2) * * *

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if it has issued cease and desist orders regarding such acts or practices, or any other information available to the Commission indicates a pattern of unfair or deceptive acts or practices.

(c) through (g) * * *

[(h)(1) The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceeding.

[(2) The Commission shall reserve an amount equal to 25 percent of the amount appropriated for the payment of compensation under this subsection for any fiscal year for use in accordance with this paragraph. Such reserved amount shall be available solely for the payment of compensation to persons who either (A) would be regulated by the proposed rule involved; or (B) represent persons who would be so regulated. Any portion of such reserved amount which is not used for the payment of compensation to such persons under this paragraph shall revert to the Treasury of the United States.

[(3) The aggregate amount of compensation paid to all persons in any fiscal year under this subsection may not exceed $1,000,000.

[(4) The Commission, in connection with the administration of this subsection pursuant to rules prescribed by the Commission under paragraph (1), shall establish a small business outreach program. Such program shall—

[(A) solicit public comment from small businesses whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and

[(B) encourage the participation of small businesses in the compensation program administered by the Commission under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation under such program.]

[(i)] *(h)* The Commission shall not have any authority to promulgate any rule in the children's adverting proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce. *The Commission shall have no authority under this section to initiate any new rulemaking proceeding which is intended to or may result in the promulgation of any rule by the Commission which prohibits or otherwise regulates any commercial adverting on the basis of a determination by the Commission that such commercial advertising constitutes an unfair act or practice in or affecting commerce.*

[(j)] *(i)*(1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with

the Commission to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and,

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

[(k)] *(j)* Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such as authorized by law.

Section 20 of That Act

SEC. 20. (a) For purposes of this section:

(1) The terms "civil investigative demand" and "demand" mean any demand issued by the Commission under subsection (c)(1).

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(3) The term "Commission investigation" means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1))] *acts or practices or methods of competition declared unlawful by a law administered by the Commission.*

(4) through (6) * * *

(7) The term "physical evidence" means any object or device, including any medical device, food product, drug, nutritional product, cosmetic product, or audio or video recording.

(7) The term "violation" means any act or omission constituting an [unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1))] *act or practice or method of competition declared unlawful by a law administered by the Commission.*

(b) For the purpose of investigations performed pursuant to this section with respect to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)] *any act or practice or method of competition declared unlawful by a law administered by the Commission* all actions of the Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any *physical evidence or* documentary material, or may have any information, relevant to [unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)] *any act or practice or method of competition declared unlawful by a law administered by the Commission* the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person *to produce such physical evidence for inspection,* to produce such documentary material for inspection and copying or reproduction, to file written reports or answers to questions, to give oral testimony concerning *physical evidence,* documentary material or other information, or to furnish any combination of such *evidence,* material, answers, or testimony.

(2) * * *

(3) Each civil investigative demand for the production of *physical evidence or* documentary material shall—

(A) describe each class of *physical evidence or* documentary material to be produced under the demand with such definiteness and certainty as to permit such *evidence or* material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the *evidence or* material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such *evidence or* material shall be made available.

(4) through (9) * * *

(10) The production of *physical evidence or* documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the *physical evidence or* documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(11) through (12) * * *

(d) through (i) * * *

(j) The provisions of this section shall not—

(1) apply to any proceeding under section 5(b), *any proceeding under section 11(b) of the Clayton Act, or any adjudicative proceeding under any other provision of law*; or

(2) apply to or affect the jurisdiction, duties, or powers of any agency of the Federal Government, other than the Commission.

Section 23 of That Act

SEC. 23. * * *

SEC. 24. (a) The Commission shall not have any authority to conduct any study, investigation, or prosecution of any agricultural cooperative for any conduct which, because of the provisions of the Act entitled "An Act to authorize association of producers of agricultural products", approved February 18, 1922 (7 U.S.C. 291 et seq., commonly known as the Capper-Volstead Act), is not a violation of any of the antitrust Acts of this Act.

(b) The Commission shall not have any authority to conduct any study or investigation of any agricultural marketing orders.

Section 24 of That Act

SEC. [24] *25.* There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $42,000,000 for the fiscal year ending June 30, 1975; not to exceed $47,091,000 for the fiscal year ending June 30, 1976; and not to exceed $50,000,000 for the fiscal year ending in 1977; not to exceed $70,000,000 for the fiscal year ending September 30, 1980; not to exceed $75,000,000 for fiscal year ending September 30, 1981; [and] not to exceed $80,000,000 for the fiscal year ending September 30, 1982*; not to exceed $69,580,000 for the fiscal year ending September 30, 1990; not to exceed $72,780,000 for the fiscal year ending September 30, 1991; and not to exceed $76,128,000 for the fiscal year ending September 30, 1992, and such additional sums for the fiscal years ending September 30, 1990 and September 30, 1991, as may be necessary for increases in salary, pay, and other employee benefits as authorized by law.*

Section 25 of That Act

SEC. [25] *26.* This Act may be cited as the "Federal Trade Commission Act".

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